IN THE

Supreme Court of the United States

October Term, 1978

No. 78-410

LEE-HY PAVING CORP. and DAVIS E. CLEM,

Petitioners,

against

MARGUERITE T. O'CONNOR, as Administratrix of the Goods, Chattels and Credits of DANIEL J. O'CONNOR, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Lee-Hy Paving Corp. and Davis E. Clem, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this action on June 12, 1978.

Opinions Below

The opinion of the Second Circuit affirming the decision of the District Court has not yet been officially reported. It appears as Appendix A hereto (pp. A1-A25, *infra*). The opinion of the District Court is reported at 437 F. Supp. 994 (E.D.N.Y. 1977) and appears as Appendix B (pp. A26-A49, *infra*).

Jurisdiction

The order of the Second Circuit was issued on June 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), *e.g.*, *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977); *Aldinger* v. *Howard*, 427 U.S. 1 (1967).

Issue Presented

Does the procedure for obtaining jurisdiction *quasi in rem* over defendants who are not residents of, and have no contacts with, the State of New York, by attaching the obligations to defend and indemnify said defendants contained in a policy of public liability insurance issued outside New York by an insurance company which does business in New York offend traditional standards of fairness and substantial justice enunciated in *International Shoe* v. *Washington*, 326 U.S. 310 (1945), and made applicable to exercises of *in rem* jurisdiction by *Shaffer* v. *Heitner*, 433 U.S. 186 (1977)?

More simply put, the question may be stated as whether *Shaffer* v. *Heitner* renders unconstitutional those exercises of *in rem* jurisdiction based upon the attachment in

New York a nonresident defendant's liability insurance policy under authority of *Seider* v. *Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1906)?

Statement of the Case

This is an action for personal injuries and wrongful death arising out of an industrial accident which occurred at the Regency Square Shopping Center located near Richmond, Virginia. On September 24, 1975 respondent's decedent, Daniel J. O'Connor, was apparently struck and killed by a motor grader owned by petitioner Lee-Hy Paving Corp. ("Lee-Hy") and operated by petitioner Davis E. Clem, an employee of Lee-Hy. There were no eyewitnesses to the accident. The jurisdiction of the District Court was based on diversity of citizenship, 28 U.S.C. §1332(a)(1).

Petitioner Lee-Hy is a Virginia corporation which specializes in grading, paving and the installation of such associated improvements as curbs, gutters, etc. Lee-Hy is a local concern, and has done no work in any state outside Virginia. Petitioner Clem is an employee of Lee-Hy and a resident of the State of Virginia. Neither Lee-Hy nor Mr. Clem has any contacts or relations with the State of New York.

Respondent's decedent, Daniel J. O'Connor, was, at the time of his death, a New York resident and was employed as a general manager in an executive capacity by the Leonard L. Farber Company, a New York proprietorship, located at 60 East 42nd Street in New York City. For some time prior to his death, Mr. O'Connor had been

engaged in supervising all construction and development activities at the Regency Square Shopping Center. In the performance of his duties, Mr. O'Connor was present at the construction site at least one day, and frequently two or three days per week from at least February to September, 1975. It was during one of his regular visits to the Regency Square project that the accident in which Mr. O'Connor was killed took place. Respondent's complaint alleges that the accident occurred as a result of the petitioners' negligence in the operation and control of the motor grader. Petitioners have denied that Mr. O'Connor's death resulted from any negligence on their part.

By notice dated November 10, 1975 and filed with the District Court on November 11, 1975, respondent sought an order permitting her to attach the contractual obligations of Royal-Globe Insurance Companies and Continental Casualty Company to defend and indemnify petitioner Lee-Hy pursuant to certain policies of liability insurance issued by those companies to Lee-Hy in Virginia. Respondent claimed that she was entitled to an order of attachment pursuant to New York Civil Practice Law and Rules §6201 by reason of the fact that neither Lee-Hy nor Mr. Clem was a citizen, resident or domiciliary of New York. Instead, petitioners were and are citizens, residents and domiciliaries of the State of Virginia. Petitioners' insurers, however, do business in New York as well as in Virginia. Legal authority for respondent's attachment motion was based upon *Seider* v. *Roth, supra*, and its progeny.

Respondent obtained the requested order of attachment on December 9, 1975, and a copy of the order was served on petitioners' insurers on or about December 16, 1975.

The summons and complaint were served on petitioners in Virginia on or about January 5, 1976. Answers were interposed on behalf of both petitioners on or about February 24, 1976.

By motion dated July 22, 1977 petitioners sought an order vacating the order of attachment, setting aside service of process, and dismissing this action on the grounds that since they have no contacts whatever with the State of New York, the species of *quasi in rem* jurisdiction asserted here is in direct conflict with the due process standards set forth just before by this Court in *Shaffer* v. *Heitner, supra.* Petitioners' motion was denied by Judge Dooling in the District Court on September 27, 1977 (Appendix B, pp. A26-A49, *infra*).

On October 14, 1977, on petitioners' motion, Judge Dooling amended his order by inserting the following language:

> "The foregoing order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Thereafter, on October 25, 1977, petitioners filed a petition for leave to appeal to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §1292(b), which was granted by order dated January 23, 1978. The case was consolidated for argument with several other cases, including *Schwartz* v. *Gillespie* and *Kotsonis* v. *Superior Motor Express* in which a petition for certiorari was filed August 15, 1978, and *Ferruzzo* v.

Bright Trucking, Inc., in which we are informed that a petition is to be filed. Oral argument was heard by the Second Circuit on April 12, 1978, and a decision affirming the orders of the District Courts was rendered on June 12, 1978 (Appendix A, pp. A1-A25, *infra*).

Reasons for Granting the Writ

1. The decision below is in direct conflict with the jurisdictional principles set forth in *Shaffer* v. *Heitner*.

a. Seider *v.* Roth

This case presents for decision the question of the continuing constitutional validity under *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), of the doctrine of *Seider* v. *Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966). As was noted above, this action, based upon an accident which occurred in Virginia, was brought in the United States District Court for the Eastern District of New York by attaching the contractual obligations to defend and indemnify the petitioners arising under policies of insurance written and issued in Virginia to petitioner Lee-Hy Paving Corp.

The attachment in New York of the obligations owed to the petitioners under Virginia insurance policies was sanctioned by *Seider* v. *Roth*, *supra*. In that case, a closely divided New York Court of Appeals held that as soon as an accident occurs, there is imposed on a defendant's insurer a contractual obligation to defend and indemnify its insured which may be considered a debt, and therefore subject to attachment under New York law.

Constitutional objections to the attachment procedure authorized by *Seider* v. *Roth* were addressed by the New York Court of Appeals in *Simpson* v. *Loehmann*, 21 N.Y.2d 305, 287 N.Y.S.2d 633, 234 N.E.2d 669 (1967), *mot. for re-argument denied*, 21 N.Y.2d 990, 290 N.Y.S.2d 914, 238 N.E.2d 319 (1968):

> "As demonstrated by a reading of the majority and dissenting opinions in the *Seider* case, the question whether the insurer's obligation constitutes a debt owing to the insured defendant and, as such, is subject to attachment under the CPLR was thoroughly debated and considered. It was our opinion when we decided that case, and it still is, that jurisdiction in rem was acquired by the attachment in view of the fact that the policy obligation was a debt to the defendant. *And we perceive no denial of due process since the presence of the debt in this State* (see *e.g.*, *Harris* v. *Balk*, 198 U.S. 215, *supra*)*—contingent or inchoate though it may be—represents sufficient of a property right to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him.*" 21 N.Y.2d at 310, 287 N.Y.S.2d at 636, 234 N.E.2d at 671 (emphasis added).

Although *Simpson* v. *Loehmann* sustained the *Seider* doctrine against constitutional challenge, it appears that four of the seven judges on the court were actually of the opinion that *Seider* had been wrongly decided. Judge Breitel, joined by Judge Bergan, concurred in a separate opinion solely because he felt that:

> "[o]nly a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of [*Seider* v. *Roth*]." 21 N.Y.2d at 314, 287 N.Y.S.2d at 640, 234 N.E.2d at 674.

Judges Burke and Scileppi dissented, questioning whether New York had sufficient minimum connection with the property and the suit to satisfy due process. 21 N.Y.2d at 321, 287 N.Y.S.2d at 646, 234 N.E.2d at 678.

Subsequent decisions by the New York Court of Appeals suggest that grave doubts about the doctrine continue, and that adherence to it rests primarily on loyalty to *stare decisis*. See *Neumann* v. *Dunham*, 39 N.Y.2d 999, 387 N.Y.S.2d 240, 355 N.E.2d 294 (1976); *Donawitz* v. *Danek*, 42 N.Y.2d 138, 379 N.Y.S.2d 592, 366 N.E.2d 253 (1977).

A similar opinion on the constitutional foundations of the *Seider* doctrine was expressed in a divided opinion by the Second Circuit in *Miniciello* v. *Rosenberg*, 410 F.2d 106 (2d Cir. 1968), adhered to *en banc*, 410 F.2d 117 (2d Cir.) *cert. denied*, 396 U.S. 844, *reh. denied*, 396 U.S. 949 (1969). Although the panel opinion by Judge Friendly (Judge Anderson, dissenting) approved *Seider* as "in effect a judicially created direct action statute," 410 F.2d at 109,* the opinion *en banc*, entered over the dissents of Judges Anderson, Lumbard and Moore, makes abundantly clear the constitutional basis on which the Second Circuit considered *Seider* to rest:

> "Appellants complain we did not adequately focus on the burden to a nonresident of having to defend a

* It is instructive to note that when the New York State Legislature sought to enact a "direct action" remedy, the statute was vetoed by then-Governnor Rockefeller. The Legislature took no further action on its proposal, although the Governor's objections were technical in nature. See Governor's Memorandum No. 26, vetoing S. 2253, 1973 New York State Legislative Annual, p. 349. In view of this absence of legislative support, it seems questionable at best for a federal court, sitting in review of a challenged state court precedent, to continue to rely on a "direct action" rationale.

personal-injury action in another state, conceivably far from his domicile and the place of the accident, simply because his liability insurer has chosen to do business there.

"*We find this argument unpersuasive so long as Harris* v. *Balk*, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905) *stands.*" 410 F.2d at 117-18 (emphasis added).

Thus it is clear that until this Court decided *Shaffer* v. *Heitner, supra,* both the Second Circuit and the New York Court of Appeals found constitutional support for *Seider* only in the traditional law of *in rem* jurisdiction.

b. Shaffer *v.* Heitner

With its decision in *Shaffer* v. *Heitner, supra,* this Court effected a revolution in the law of *in rem* jurisdiction. Under previous decisions, chiefly *Pennoyer* v. *Neff*, 95 U.S. 714 (1877) and *Harris* v. *Balk*, 198 U.S. 215 (1905), the presence in the forum state of a defendant's property, either physically in the case of tangible property or fictionally in the case of intangibles, conferred jurisdiction on the courts of the forum to adjudicate any dispute and grant relief up to the value of the property attached. No limitation was placed on the type of dispute which could be brought before the attaching court, and the burden on the defendant of being compelled to litigate in a remote location was deemed indirect, and therefore irrelevant.

Recognizing that "the phrase 'judicial jurisdiction over a thing' is a customary eliptical way of referring to jurisdiction over the interests of persons in a thing," this Court extended the rule of *International Shoe* v. *Washington*, 326

U.S. 310 (1945), to exercises of jurisdiction *in rem*. No longer, after *Shaffer*, is the mere presence of a defendant's property in the forum state a sufficient predicate for the exercise of *in rem* jurisdiction. Rather, the Court held, due process requires that there be sufficient contacts among the defendant, the forum and the litigation to satisfy "traditional notions of fairness and substantial justice."

By thus enunciating a single standard against which to measure all exercises of jurisdiction, *Shaffer* went far toward making the law both fair and rational. However, the continued vitality of that single standard, and the rationality it introduced into an archaic and essentially irrational area of the law, are jeopardized by the decision below in this case.

c. The decision below is in direct conflict with the principles set forth in Shaffer *v.* Heitner.

In refusing to budge from its position on the *Seider* v. *Roth* doctrine, laid down before *Shaffer* and before the demise in that case of *Harris* v. *Balk*, the Second Circuit ignored the glaring inconsistencies between that doctrine and the principles embodied in *Shaffer*. Judge Friendly's opinion clearly reflects the view of the court below that the law of jurisdiction has not changed with the advent of *Shaffer* v. *Heitner*, and that the concepts and analysis employed to sustain *Seider* in *Miniciello* v. *Rosenberg, supra*, remain viable and unaffected.

At least one leading expert and commentator on New York Procedure, Dean Joseph M. McLaughlin of Fordham University Law School, who is also Chairman of the New

York Law Revision Commission, has expressed surprise and disappointment at the failure of the court below to recognize that the *Seider* doctrine cannot survive this Court's decision in *Shaffer*. *See* McLaughlin, *New York Trial Practice,* 179 N.Y.L.J., July 14, 1978, p. 1. For it is clear that, in virtually every respect, *Seider* fails to meet the constitutional standards *Shaffer* prescribes.

First, it was conceded by the respondent, and noted by both the District Court (p. A31) and the Court of Appeals (p. A5), that these petitioners have absolutely no contacts with the State of New York. This fact alone is sufficient to defeat the jurisdiction asserted in this case, since the fundamental teaching of *Shaffer,* and of *International Shoe,* is that there must be:

> "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." 433 U.S. at 203, quoting *International Shoe* v. *Washington,* 326 U.S. at 317.

Further, the property attached has no relation to New York. The attachment here was permitted on the basis of the fiction, derived ultimately from *Harris* v. *Balk, supra,* that the insurance policies, written and issued in Virginia to Virginia residents, may be considered present in New York because petitioner Lee-Hy's insurers do business there.

It is also clear that the property attached is not related to respondent's cause of action, which sounds in negligence. The sole function of the attached policies is to serve as a

putative source of recovery should respondent establish her claims at trial.

Finally, the cause of action itself has no relationship to New York aside from the fact that respondent is a New York resident, as was Mr. O'Connor before his death. However, as this Court held in *Hanson* v. *Denkla,* 357 U.S. 235, 253 (1957) and affirmed in *Shaffer,* 433 U.S. at 216:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avail itself of the privilege thus invoking the benefits and protections of its laws [citing *International Shoe* v. *Washington, supra*]."

Thus it is clear that the relationship among the defendants, the forum and the litigation required by *Shaffer* is completely missing in this case.

Petitioners respectfully submit that the intervention of this Court is required to insure the continued integrity and universality of the *Shaffer* decision. For in upholding the doctrine of *Seider* v. *Roth* and tenaciously refusing to reexamine seriously its decision in *Miniciello* v. *Rosenberg,* the Court of Appeals has completely ignored *Shaffer* and has perpetuated the most extreme and unfair example of *quasi in rem* jurisdiction which has sprung from the discredited precedent of *Harris* v. *Balk.* If it is followed by other courts, the decision of the Court of Appeals will seriously undermine the consistency, fairness and rationality which this Court sought to introduce, through *Shaffer,* into

the law of jurisdiction. Meantime, it leaves the law applied within the State of New York a shambles which the court below declined to correct by applying *Shaffer* as that decision requires.

2. The decision below will have immediate and adverse consequences in several states.

Although most states have, to date, rejected the *Seider* doctrine,* its approval by the Court of Appeals in the present case will probably have an immediate impact on at least two states besides New York. The Supreme Court of Minnesota has now pending before it the case of *Savchuk* v. *Rush*, Docket No. 45556. In a prior opinion in that case, reported at 245 N.W.2d 624 (Minn. 1976), the Minnesota court followed *Seider* and held that a Minnesota resident could obtain *quasi in rem* jurisdiction over a nonresident by attachment of obligations arising under the nonresident's liability insurance. Thereafter, this Court vacated the judgment of the Minnesota Supreme Court, and remanded the case for reconsideration in light of *Shaffer* v. *Heitner*. *Rush* v. *Savchuk*, 433 U.S. 902 (1977). If the decision of the Court of Appeals in the instant case is allowed to stand, the Minnesota court may well adhere to its prior judgment and continue to apply the doctrine of *Seider* v. *Roth* in that state. This Court's remand could not have contemplated such a result.

In addition, the courts of New Hampshire permit a *Seider*-type attachment against residents of those states

* Cf. *Javorek* v. *Superior Court*, 17 Cal.3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976), in which the California Supreme Court analyzed the conceptual flaws in the *Seider* doctrine, and listed those cases from other jurisdictions which have rejected it.

which have adopted *Seider* v. *Roth*. *Camire* v. *Scieszka*, 358 A.2d 397 (N.H. 1976). Thus, residents of both New York and Minnesota will be subject to the attachment jurisdiction of New Hampshire's courts if the decision below is allowed to stand.

When the impact of continued *Seider*-based litigation in New York is added to the effects already indicated in Minnesota and New Hampshire, the importance of the issues presented here becomes even more obvious. Since New York is one of the major commercial and economic centers in the country, most insurance companies find it necessary to do business there. Thus, the overwhelming majority of liability insurance policies written in this country—perhaps even in the world—would be subject to New York attachment. And since anyone who drives an automobile, owns a home or conducts a business is normally required to obtain liability insurance, it is clear that virtually anyone anywhere in the country could be hailed before the courts of New York to answer allegations stemming from actions which may have taken place on his own doorstep.

Although there are no statistics available which would indicate the number of actions commenced on the basis of a *Seider* v. *Roth* attachment, research reveals some 75 reported cases in New York state courts and in federal courts in New York and other states in which assertions of jurisdiction based on *Seider* have been considered.* These reported cases are undoubtedly only the tip of the iceberg, since only a small percentage of cases result in a published

* This figure does not include cases in state courts outside New York where the *Seider* doctrine has been considered. See the list of cases contained in *Javorek* v. *Superior Court*, *supra*.

opinion. It therefore seems safe to estimate that literally hundreds of actions have been commenced on the basis of the *Seider* doctrine. The opinion below will undoubtedly encourage institution of many more.

The unfairness to the defendants, and their insurers, in these actions is manifest. A defendant who wishes to defend against a plaintiff's allegations is forced to attend trial in New York, hundreds or even thousands of miles from his home. Although his transportation to and from the trial may be provided by his insurer, such a defendant still faces the possibility of extreme hardship because of the forced separation from family and business. In the present case, a trial in New York would work a serious disruption in the business activities of petitioner Lee-Hy, since its key supervisory and operating personnel would be needed to testify. Any projects on which those employees were involved at the time would have to be halted or abandoned during their absence.

Moreover, the increased cost of defending an action in a forum remote from the scene of an accident and from the homes of its insured and most of the witnesses may force an insurer simply to settle rather than to insist on the defendant's right to his day in court. An insured defendant would thereby be deprived of any opportunity to vindicate his position, and may face increased insurance costs.

Further, an unsuccessful defendant in a *Seider* action in New York may find himself faced with a subsequent action in his home state for the difference between the verdict and the amount of his insurance coverage. Such a defendant may find himself bereft of all protection, since his insurer may refuse to defend the subsequent action on

the ground that it had provided a defense and paid up to the limit of the policy attached.

These consequences show clearly that, if the decision below is allowed to stand, many of the abuses this Court sought to eradicate in *Shaffer* will be perpetuated, and *Shaffer* itself subjected to serious erosion in this important area of litigation. The wholesome step which this Court took in adopting a rational, universal principle for determining the existence of jurisdiction should be firmly enforced from the outset, and not subject to being frittered away on the basis of legal fictions confected in various jurisdictions.

Conclusion

For all of the foregoing reasons, it is respectfully requested that the Court grant this petition for a writ of certiorari. The error below seems so clear, in light of *Shaffer,* that we respectfully suggest that this is a proper case for summary reversal with directions to dismiss the action.

Respectfully submitted,

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Appendices

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 845, 846, 849, 851, 878, 879—September Term, 1977

(Argued April 12, 1978 Decided June 12, 1978.)

Docket Nos. 78-7044, 78-7047, 78-7050, 78-7051, 78-7058, 78-7076

MARGUERITE T. O'CONNOR, as Administratrix of the Goods, Chattels and Credits of DANIEL J. O'CONNOR, Deceased,

Plaintiff-Appellee,

v.

LEE-HY PAVING CORP. and DAVIS E. CLEM,

Defendants-Appellants.

VINCENT J. FERRUZZO,

Plaintiff-Appellee,

v.

BRIGHT TRUCKING INC., JOE E. LARSON and LANDY OF WISCONSIN, INC.,

Defendants-Appellants.

Appendix A

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,
Plaintiff-Appellee,

v.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO. and the Estate of KENNETH EDWARD BENTLEY,
Defendants-Appellants.

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,
Plaintiffs-Appellees,

v.

BOSTON HOSPITAL FOR WOMEN, also known as BOSTON LYING IN HOSPITAL, and LUKE GILLESPIE,
Defendants-Appellants.

FRIENDLY, *Circuit Judge:*

We have before us four interlocutory appeals, pursuant to 28 U.S.C. §1292(b), which raise the question whether *Seider* v. *Roth*, 17 N.Y. 2d 111, 269 N.Y.S.2d 99 (1966), sanctioning a procedure for obtaining jurisdiction in a negligence action by a New York resident against a non-resident defendant for wrongful death or personal injury in an out-of-state accident through attachment of a policy of liability insurance issued by an insurer doing business in New York, the constitutionality of which was upheld by this court in *Minichiello* v. *Rosenberg*, 410 F.2d 106 (1968), *adhered to en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969), has been undermined by *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). A fifth interlocutory appeal pursuant to 28 U.S.C. §1292(b) in one of these cases raises an in-

dependent question whether the district court was correct in holding that the liability of the defendant was determinable not by Virginia law, under which allegedly no liability could exist, but rather by New York law, under which it could if negligence was established. All four actions were brought by New York resident plaintiffs against non-resident defendants, and federal jurisdiction rested on 28 U.S.C. §1332.

In each of the four cases the district courts denied motions of the defendants to vacate the attachment of their insurance policies and dismiss the actions. Since the cases are similar so far as the legal question is concerned and the courts in *Schwartz*, *Kotsonis*, and *Ferruzzo* expressly followed the lead of Judge Dooling's opinion in *O'Connor* v. *Lee-Hy Paving Corp.*, we will state in text only the facts of *O'Connor* and will summarize the three other cases in the margin.[1]

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1. In *Schwartz* v. *Boston Hospital for Women*, Docket Nos. 78-7044, 7076 (decided Oct. 21, 1977), Gloria Schwartz and her husband brought suit in the District Court for the Southern District of New York against the Boston Hospital and Dr. Luke Gillespie for medical malpractice alleged to have occurred in Massachusetts when Mrs. Schwartz was at the hospital and under the care of Dr. Gillespie. The Boston Hospital is a Massachusetts corporation and Dr. Gillespie a Massachusetts resident. Jurisdiction over defendants was obtained by attaching the contractual obligations of St. Paul Fire & Marine Insurance Co. and Lumbermen's Mutual Casualty Co., both of which maintain offices in New York, to defend and indemnify the respective defendants under their insurance policies. Although defendants allege that their case is distinguishable from the others before us on the basis that the plaintiffs were not New York residents at the time of the alleged malpractice, Judge Lasker had earlier found that plaintiffs were New York domiciliaries at that time. *Schwartz* v. *Boston Hospital for Women*, 71 Civ. 1562 (September 29, 1975), at 2-3. We sustain that conclusion.

The plaintiff in *Kotsonis* v. *Superior Motor Express*, Docket No. 78-7058 (decided Dec. 6, 1977), sued in the District Court for the

(footnote continued on next page)

Appendix A

Mrs. Marguerite O'Connor, administratrix of the estate of her husband, Daniel J. O'Connor, sues for personal injuries to and the wrongful death of her husband which occurred in an industrial accident at the construction site of the Regency Square Shopping Center near Richmond, Virginia. Plaintiff alleges that her husband was struck and killed by a motor grader owned by defendant Lee-Hy Paving Corp. and negligently operated by defendant Davis E. Clem, an employee of Lee-Hy. O'Connor was a New York resident and was employed by L. Farber & Co., a New York proprietorship. His duties with Farber included

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Eastern District of New York, individually and as administratrix of the estate of her husband, Padias Kotsonis, for damages resulting from an accident in Maryland in which the decedent's truck was struck by a vehicle owned by Superior Motor Express, which was towing a a trailer owned by Earnhardt Lumber Co. and was driven by Kenneth Bentley, an employee of Earnhardt. Kotsonis was a New York resident. All of the defendants are residents of North Carolina and do not transact business in New York. Plaintiff obtained an order of attachment of the contractual obligation of Kemper Insurance Co. to defend and indemnify the defendants. Kemper does business in the state of New York. Judge Nickerson denied the defendants' motions to vacate both the service of process and the order of attachment, or alternatively to dismiss or transfer the case on the ground of *forum non conveniens*. Only the former ruling is before us.

The plaintiff in *Ferruzzo* v. *Bright Trucking Inc.*, Docket No. 78-7047 (decided Dec. 22, 1977), sustained injuries in a collision in Indiana as a result of the allegedly negligent operation of a tractor-trailer owned by Landy of Wisconsin, Inc., a Wisconsin corporation, leased by Bright Trucking, Inc., a Minnesota corporation, and driven by Joseph Larson, an employee of Landy and a resident of Wisconsin. Plaintiff is a resident of New York and is employed by a New York firm for which he was transporting inventory at the time of the accident. He brought suit in the District Court for the Eastern District of New York and obtained jurisdiction over defendants Landy and Larson by attaching the obligation of Hartford Accident & Indemnity Co., which does business in New York, to defend and indemnify them pursuant to its insurance policy with Landy. Plaintiff moved to confirm the order and defendant cross-moved to vacate it or in the alternative to transfer venue to Indiana. Judge Sifton of the Eastern District granted the plaintiff's motion and denied the defendants'.

supervising construction of the Regency Square Shopping Center, which took him to the construction site at least one day a week, and frequently three or four times a week. He was on an overnight visit when he was killed on September 25, 1975. Defendant Lee-Hy, is a Virginia corporation which transacts no business in New York. Defendant Clem is an employee of Lee-Hy and a resident of Virginia, who has no contacts with New York.

Plaintiff filed her complaint in the District Court for the Eastern District of New York on November 6, 1975 and thereafter moved for an order pursuant to New York Civil Practice Law and Rules §6201 to attach the contractual obligations of Royal-Globe Insurance Co. and Continental Casualty Co. to defend and indemnify Lee-Hy under its insurance policies. Both insurance companies do business in New York and have offices in the state, but neither lists New York as its principal place of business.

The requested order was granted on December 9, 1975. On July 22, 1977, a month after the *Shaffer* decision, defendants made the motion here at issue, which Judge Dooling denied in a carefully considered opinion on September 27, 1977, 437 F.Supp. 994. On October 14, 1977, he certified interlocutory appeals from his decision and also from an earlier order concerning the choice of law issue indicated above. This court granted defendants' petition for leave to appeal both orders on January 23, 1978. This appeal followed.[2]

2. There have been a number of decisions on the jurisdictional issue other than those before us. In *Emsheiner* v. *Callahan*, No. 76 C 325 (E.D.N.Y., Oct. 19, 1977), Judge Pratt raised the issue of the

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Appendix A

Appellants' attack on the decisions below is simple and straightforward. In their view, *Shaffer* conditions the exercise of what has been called *quasi in rem* jurisdiction, more particularly the exercise of jurisdiction where the ownership of property within the state is used to subject

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continued viability of *Seider* after *Shaffer*. Both counsel agreed that Judge Dooling's opinion in the *O'Connor* case had resolved the issue, and Judge Pratt entered an order accordingly.

One month later, in *Torres* v. *Towmotor Division of Caterpillar, Inc.*, Civ. No. 77 C 1810 (E.D.N.Y., Nov. 18, 1977), Judge Bramwell denied the plaintiffs' motion for an attachment order on the ground that *Seider* v. *Roth*, *supra*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, had been undermined by *Shaffer*. *Torres* was a products liability action by a New York resident against the manufacturer and distributor of a forklift which injured him in the course of his employment in New Jersey. The plaintiff sought to obtain jurisdiction in New York over the distributor, a New Jersey corporation, by attaching its insurer's obligation to defend and indemnify the corporation. After reviewing the development of the *Seider* line of cases and our opinions upholding the constitutionality of *Seider*, Judge Bramwell ruled that the *Seider* procedure was not a direct action against the insurer and did not fulfill the minimum contacts requirement of *Shaffer* and concluded that *Harris* v. *Balk*, 198 U.S. 215 (1905),

> was the seed from which *Seider* evolved and it provided the roots through which *Seider* was nourished. Thus, since this seed has been pulled and its roots have been severed from the fertile field of legal precedent by *Shaffer*, *Seider*'s viability has likewise been quashed.

Torres, *supra* at 36. For reasons not known to us, this decision has not been appealed. Judge Sifton in *Ferruzzo* and Judge Nickerson in *Kotsonis* had both the *O'Connor* and the *Torres* opinions before them in rendering their decisions upholding the constitutionality of *Seider* in December, 1977.

A number of New York state courts have also considered the question. The Fourth Department of the Appellate Division upheld the constitutionality of *Seider* and its progeny in *Alford* v. *McGaw*, No. 48/1978 (March 1, 1978). There, New York plaintiffs who were injured in Ontario, Canada when their car was struck by the defendant's car brought an action for damages in New York. Plaintiffs obtained jurisdiction over the defendant, a resident of Ontario, by attaching the obligation of the Hartford Fire Insurance Co., which

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the defendant to its courts,[3] on the existence of at least some other "contacts" between the defendant and the state. In these four cases there are admittedly no contacts between the named defendants and New York. Although appellants consider this argument alone to be dispositive, they add other makeweights. They contend that in sustaining the constitutionality of *Seider*, both the New York Court of Appeals in *Simpson* v. *Loehmann*, 21 N.Y.2d 305, 310, 287 N.Y.S.2d 633, 636 (1967), *motion for reargument denied*, 21 N.Y.2d 990, 290 N.Y.S.2d 914 (1968), and this court in *Minichiello* v. *Rosenberg*, *supra*, 410 F.2d at 117-18, rested squarely on *Harris* v. *Balk*, *supra*, 198 U.S. 215. Since *Shaffer* clearly overruled *Harris* on its own facts, 433 U.S. at 208-09, *Seider*, they say, must fall with it. By way of minimizing the Court of Appeals' determination in *Simpson* that *Seider* comports with the *International*

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does business in the state of New York, to defend and indemnify him. The Appellate Division upheld the trial court's refusal to vacate the attachment because the relationship of the insurance company's debt to the cause of action and the company's central role in the litigation satisfied the minimum contacts test prescribed by *Shaffer*.

Lower courts in New York have come out on both sides of the question. Compare *Rodriquez* v. *Wolfe*, N.Y.L.J., 2/6/78, p. 15, col. 1; *Nelson* v. *Warner Bros. Jungle Habitat*, N.Y.L.J., 3/17/78, p. 7, col. 1; *Smith* v. *Kraftco Corp.*, N.Y.L.J., 3/24/78, p. 12, col. 3, upholding *Seider*; with *Kennedy* v. *Deroker*, 398 N.Y.S.2d 628 (1977); *Katz* v. *Umansky*, 399 N.Y.S.2d 412 (1977); *Wallace* v. *Target Store, Inc.*, 400 N.Y.S.2d 478 (1977); *Hutchinson* v. *Hayes Bros., Inc.*, N.Y.L.J., 3/17/78, p. 4, col. 2; *Schoen* v. *Berotti*, N.Y. L.J., 3/17/78, p. 7, col. 3, finding *Seider* attachment unconstitutional.

3. The Restatement of Judgments 2d, §11, calls this "attachment jurisdiction" (Tent. Draft No. 5, March 10, 1978). This description is useful since, unlike the more general term "quasi in rem jurisdiction," it differentiates the cases with which we are concerned from those where "claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant," *Shaffer*, *supra*, 433 U.S. at 207, and we shall use it.

Shoe fairness standard, they point to Chief Judge Fuld's remark in that case inviting the New York Law Revision Commission and the Advisory Committee of the Judicial Conference "to conduct studies in depth and make recommenations with respect to the impact of *in rem* jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally." 21 N.Y.2d at 312, 287 N.Y.S.2d at 638. This task, they suggest, has now been performed by a still more august body, the Supreme Court of the United States.[4]

If the plaintiffs in these cases had "attached" the debt to defendants of a debtor only transitorily in New York, as in *Harris* v. *Balk*, or even bank accounts maintained by

4. It is difficult to fathom how a Supreme Court decision which mandates the very type of inquiry in which the Court of Appeals engaged can fill the office that appellants ascribe to it. Quite clearly, what Judge Fuld sought was information concerning the practical consequences of the *Seider* attachment procedure, information which significantly has not been forthcoming in these proceedings. See pp. 3439-40 *infra*.

Inherent in appellants' brief and argument is a contention that, as is claimed to be evidenced by Judge Breitel's concurrence for himself and Judge Bergan in *Simpson*, *supra*, 21 N.Y.2d at 314-16, 287 N.Y.S.2d at 640-42, by *Newman* v. *Dunham*, 39 N.Y.2d 999, 387 N.Y.S.2d 240 (1976), and by *Donawitz* v. *Danek*, 42 N.Y.2d 138, 141-42, 397 N.Y.S.2d 592, 594-95 (1977), the New York Court of Appeals is disenchanted with *Seider*, clings to it only because of "considerations of institutional stability and the mandates of *stare decisis*," *Donawitz*, *supra*, 42 N.Y.2d at 142, 397 N.Y.S.2d at 595, and would welcome a decision that *Shaffer* has supplied the needed excuse for departing from precedent. Of course, the Court of Appeals is entirely free to reexamine *Seider* on its merits and conclude that, in light of the general illumination afforded by *Shaffer* or otherwise, its continued existence is undesirable as a matter of New York law. Our holding is simply that, on the basis of what is now before us, we do not find the *Seider* attachment procedure so offensive to "traditional notions of fair play and substantial justice," *Shaffer*, *supra*, 433 U.S. 203, 205, 206, 211, 212; *Kulko* v. *Superior Court of California*, 46 U.S.L.W. 4421 (May 15, 1978), as to violate the due process clause of the Fourteenth Amendment.

them in New York, we would readily agree that attachment jurisdiction could not be sustained when, as here, the defendants had no other "contacts" with New York. In such a case, *Shaffer* v. *Heitner* clearly forbids a state from depriving a defendant of his property in the debt that is owed him unless other contacts make it fair to do so. See *Intermeat, Inc.* v. *American Poultry Incorporated*, Docket Nos. 77-7481, 7495, decided April 14, 1978, slip opinions 2519. What sharply differentiates these cases from those just hypothesized is that a judgment for the plaintiff will not deprive a defendant of anything substantial that would have been otherwise useful to him. He could not recover, sell or hypothecate the covenant to indemnify; its utility is solely to protect him from liability and in an appropriate case to allow the plaintiff to recover from the insurer under §167(1)(b) of the New York Insurance Law.[5] What we said in *Minichiello, supra*, nine years ago *apropos* of *Harris* v. *Balk* remains just as true today:

> [A]ppellants' problem is significantly less serious than was Balk's in several respects. Balk had to decide

5. It might be contended that a judgment up to the policy limits would exhaust the protection of the insurance policy and thereby expose the defendant to a subsequent suit for damages in excess of those limits in a forum where *in personam* jurisdiction over him could be acquired. However, the imposition on the defendant in this respect is not greater than that effected by a direct action against the insurer, which we found permissible in *Minichiello, supra*, 410 F.2d at 110. See note 7 *infra*.

If it be contended that the line of argument in text emphasizes the questionability of the *Seider* holding that the insurer's obligation of indemnification was a "debt" attachable under New York CPLR 5201 and 6202, the answer is that this is solely a question of New York law which the Court of Appeals has authoritatively decided. See *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (Marshall, *C.J.*).

> whether to hire a Maryland lawyer to protect his interest in the $180 debt Harris owed him; the appellants are entitled to have lawyers in New York furnished by their insurers without expense. The Maryland judgment deprived Balk of money he could have used for whatever purpose he willed; *a Seider judgment would mean simply that liability policies on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured.*

410 F.2d at 118 (emphasis supplied). Moreover, since the insurance policy was purchased to protect against the type of liability which is the subject of the lawsuit and since the obligation to defend clearly encompasses the litigation, *Seider* does not sanction "the type of *quasi in rem* action typified by *Harris* v. *Balk* and the present case [sequestration of shares in a Delaware corporation]", where the property which "serves as the basis for . . . jurisdiction is *completely unrelated* to the plaintiff's cause of action," *Shaffer* v. *Heitner, supra,* 443 U.S. at 208-09 (emphasis supplied).[6] The fall of *Harris* v. *Balk* therefore

6. Some of the appellants argue that the vacating and remanding of *Savchuk* v. *Rush,* 245 N.W.2d 624 (Minn. Sup. Ct. 1976), a case upholding a *Seider* attachment, for further consideration in light of *Shaffer,* see 433 U.S. 902 (1977), indicates that the Supreme Court believed that contacts other than those between the plaintiff and the insurer were necessary to sustain jurisdiction. This reads too much into the Court's action. At most, it was an affirmation of the Court's declared unwillingness to determine at that time the extent to which jurisdictional doctrines other than those before it in *Shaffer* were affected by the decision. See *Shaffer, supra,* 433 U.S. at 208 n.30, 212 n.39). In any event, *Rush* is not so strong a case for upholding jurisdiction as this one since the plaintiff there resided at the time of the

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does not necessarily topple *Seider*, and it is necessary to probe more deeply than appellants would have us do.[7]

The overriding teaching of *Shaffer* is that courts must look at realities and not be led astray by fictions. Quoting the Restatement Second of Conflict of Laws §56, introductory note, Mr. Justice Marshall explained that "[t]he phrase 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing" and held in consequence that "in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'" 433 U.S. at 207. This need for a realistic approach had

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accident in the state in which the accident occurred and only subsequently moved to Minnesota. The dissent in *Rush* argued that substaining jurisdiction under these circumstances in effect allowed the plaintiff a choice of 50 jurisdictions in which to sue. See *Farrell* v. *Piedmont Aviation*, 411 F.2d 812 (2 Cir.), *cert. denied*, 396 U.S. 840 (1969); *Fish* v. *Bamby Bakers, Inc.*, 76 F.R.D. 511 (N.D.N.Y. 1977) (residence in New York at time of accident necessary to sustain *Seider* attachment).

7. This is recognized in the Restatement of Judgments 2d at 84-86 (Tent. Draft No. 5, March 10, 1978). Referring to the *Seider* problem this states that

> The jurisdictional question would seem to be the same for both "direct action" and attachment jurisdiction. If the circumstances that the plaintiff is a resident of State X and the insurance company is doing business there are sufficient to sustain *in personam* jurisdiction for a "direct action" against the insurer, they should *also* be sufficient to sustain attachment jurisdiction against the insurer, and vice versa.

(Emphasis supplied). As developed below, we held in *Minichiello* that these circumstances *were* sufficient to sustain *in personam* jurisdiction in a direct action against the insurer, 410 F.2d at 109-10, and nothing in *Shaffer* reflects adversely on that conclusion.

been recognized by Chief Judge Fuld when he wrote in *Simpson, supra,* 21 N.Y.2d at 311, 287 N.Y.S.2d at 637:

> The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness (See *e.g., International Shoe Co.* v. *Washington,* 326 U.S. 310; *McGee* v. *International Life Ins. Co.,* 355 U.S. 220; *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke,* 15 N.Y.2d 443 [261 N.Y.S.2d 8, 209 N.E.2d 68]). Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation.[8]

8. Judge Dooling put the point even more forcefully in the *O'Connor* case, *supra,* 437 F. Supp. at 1003:

> The emphasis in many of the cases on the supposedly contingent nature of the insurer's obligation appears to be misplaced. The occurrence of the accident, the plaintiff's injuries, and the insured's connection with the accident are determinative events. To be sure there may never be a suit, but the insured is under an immediate duty to give prompt notice of the accident to the insurer. Investigation usually commences at once, and the parties in interest, potential plaintiff, insurer and insured are identified. Control of investigation, defense and settlement are in the insured's hands. The prospective plaintiff's relationships are with the insurer, not with the insured. When an action is commenced the insurer controls the conduct of the defense, and, if the suit is in a federal court, plaintiff may obtain discovery of the existence and content of any relevant insurance agreement (Rule 26(b)(2)).

See also *Kirchen* v. *Orth,* 390 F. Supp. 313, 318-19 (E.D. Wis. 1975).

Moreover, as we said in the passage from *Minichiello* quoted above, a plaintiff's judgment in a *Seider* type case does not deprive the defendant of money; the full force of the judgment rests on the insurer. As Judge Dooling stated below, 437 F.Supp. at 1002:

> *Seider* v. *Roth* and *Simpson* are *sui generis* in the field of jurisdiction. They cannot be pigeon-holed as *in rem* or *in personam*. They are in real terms *in personam* so far as the insurer is concerned. For the named defendant the suit is only an occasion of cooperation in the defense; his active role is that of witness. It is beside the point to test the constitutionality of the procedure in terms of the named defendant; his role as a party is hardly more real than that of the casual ejector Richard Roe in common law ejectment actions. What is at stake in the suit is the plaintiff's claim for the payment of his alleged damages by the insurer.

Thus, we must first determine whether forcing the insurer to defend in New York is so unfair as to violate due process. Nothing in *Shaffer* affects so much of our prior decision in *Minichiello* as holds that an insurer doing business in New York has no justifiable ground for complaint at New York's asserting a jurisdiction over the insured which, by virtue of §167(1)(b) of the New York Insurance Law, may result in a judgment requiring the insurer to pay the plaintiff up to the policy limit. Doing business in the state continues to be a recognized basis for the existence of *in personam* jurisdiction over a corporation. See Restatement Second of Conflict of Laws, §47, adopted in Restatement Second of Judgments, *supra*, §8a (Tent.

Draft No. 5); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 317-19 (1945).[9] There is no point in rehashing the arguments concerning the inconvenience to the insurer in being obliged to try the issue of liability in a state that may be far removed from the site of the accident. All these considerations were fully canvassed in *Minichiello, supra*, 410 F.2d at 110, where we pointed out, citing *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 181 (2 Cir. 1967), which quoted von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1128 (1966), that there has been " 'a movement away from the bias favoring the defendant' in matters of personal jurisdiction 'toward permitting the plaintiff to insist that the defendant come to him' when there is a sufficient basis for doing so." Here the sufficient basis is furnished by the insurer's maintaining an office and regularly transacting business in New York—not to speak of the convenience to the plaintiff in having a trial where witnesses on damages will be more readily available and the fact that in

9. Section 47 of the Restatement Second of Conflict of Laws states:

> (1) A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action arising from the business done in the state.
>
> (2) A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction.

While there are no findings as to the substantiality or continuity of the insurers' business dealings in New York, appellants have not contested that this is "continuous and substantial." See *Beja* v. *Jahangiri*, 453 F.2d 959 (2 Cir. 1972), which discusses the standard for what constitutes "doing business" in New York in order to support a *Seider* attachment.

the large proportion of these actions that are settled the insurer usually has no particular interest in requiring the action to be brought at the site of the accident or the residence of the insured.[10] It is plain that, on this aspect of the problem, *Shaffer* has wrought no change in the law.

This, however, is not the end of the inquiry since, as recognized in *Minichiello, supra*, 410 F.2d at 110-13 (panel opinion), 117-19 (*en banc* opinion), we must also consider whether sustaining *Seider* jurisdiction would be unfair to the nominal defendant, the insured—even though, as Judge Dooling noted, 437 F.Supp. at 1003, it is somewhat ironical that "it is the insurer, the one who is responsible for the defense of the suit and for the payment of any judgment, and who is itself unable to deny that it is fully suable in the state, who puts forward the plea to jurisdiction in the name of the nominal defendant, who will not pay the judgment, nor manage the defense."

When the constitutionality of *Seider* was last before us, our chief concern in this regard was whether a *Seider* judgment, although limited in New York to the amount of the policy might be given collateral estoppel effect in some other state, at least as to issues actually litigated, see 410 F.2d at 111-12. We concluded, *id.*, that:

> Whatever the right rule may be as to *quasi in rem* judgments generally, we think it clear that neither New York nor any other state could constitutionally

10. If it be said that even in such cases the insurer may be prejudiced by fear of the supposedly greater liberality of New York juries, we fail to see why this interest is superior to that of a New York resident in having damages assessed by a jury of the state of his residence. Certainly any such interest of the insurer is not of constitutional magnitude.

> give collateral estoppel effect to a *Seider* judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense.

This conclusion has been reinforced both by portions of the Restatement Second of Judgments making numerous exceptions to the rule of issue preclusion which would clearly include a *Seider* judgment, see §68.1 (Tent. Draft No. 4, April 15, 1977), §88 (Tent. Draft No. 3, April 15, 1976), §75(c) (Tent. Draft No. 1, March 28, 1973); see also Reporters Note, *id.* at pp. 215-16 ("[i]n some contexts [involving attachment jurisdiction, issue] preclusion may be inconsistent with the requirements of due process . . . . But *absent any constitutional constraint*, it is believed that issue preclusion is appropriate." (emphasis supplied)), and by the emphasis on fair play in *Shaffer* itself. Our Statement in *Minichiello*, "we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so", 410 F.2d at 112, has even greater force when, as we now see it, the "possibility" has declined to the vanishing point.

With respect to other alleged hardships on the insured we see no occasion to add to our discussion in *Minichiello* beyond saying two things: The first is that we find some significance in the fact that although *Seider* has been the law of New York since 1966, appellants, represented by highly capable counsel, have not brought to our attention a single instance where any of the anticipated "horribles" —inability or refusal of the insured to appear in New York for deposition or trial, see 410 F.2d at 112, 118, failure

to assert a counterclaim, see 410 F.2d at 112-13, and "multiple claims where the damages exceed the policy limits and the insured is without funds to pay the excess", see 410 F.2d at 119—has occurred. The second is that we deal only with the cases before us; in holding that application of *Seider* in these cases does not offend *Shaffer* we are not saying that a case where such application might violate due process could never arise.[11]

We therefore affirm the four orders declining to vacate the "attachments" of the liability policies and to dismiss the action for want of jurisdiction.

II

The other interlocutory appeal allowed in the *O'Connor* case raises a choice of law question. Some further statement of the facts is required.

On April 16, 1974, Regency Square, Inc., a Virginia corporation, Leonard L. Farber, and E. Carlton Wilton, a Virginia real estate developer, formed Quioccasin Associates as a limited partnership with Regency Square, Inc. as the general partner. The purpose of the partnership was "to develop and operate a regional shopping center known as Regency Square Shopping Center . . . ." On the same date, Quioccasin, Regency Square, Inc. (for itself and as general partner of Quioccasin), Leonard L. Farber of

11. Although the argument may not be articulated as such, appellants' attack seems to rest in some measure on a general view that since *Seider* was regarded in many quarters as an extreme application of attachment jurisdiction, it should be among the first victims of *Shaffer*. See also Leflar, American Conflicts Law §25 (3d ed. 1977). This ignores the *sui generis* nature of *Seider* jurisdiction as outlined by Judge Dooling, 437 F. Supp. at 1002, and as analyzed above.

Florida, Inc., along with Wilton Leasing, Inc., and E. Carlton Wilton, Inc., both Virginia corporations, entered into an agreement providing in relevant part that Quioccasin would become lessee of the acreage on which the project was to be built, develop a regional shopping center to be called Regency Square Shopping Center, and engage "the services of Farber [of Florida] as developer and advisor" for the Regency Square Shopping Center. Farber was to perform its services as an independent contractor until construction was complete and 95% of the leasable area had been rented or sold and was open for business.

Lee-Hy contracted directly with Quioccasin, by the general partner, Regency Square, Inc., to engage in grading, paving and other specified work on the center. Lee-Hy was brought into the project by an employee of Farber of Florida, and its contract was negotiated by the decedent O'Connor. O'Connor was employed by Farber of New York, which was not a party to the Quioccasin agreement, but he performed services regularly for Farber of Florida in connection with construction of the shopping center and was doing this at the time of the accident that caused his death. He was covered under New York Workmen's Compensation Law by Farber of New York, and his widow has received death benefits under the New York Compensation Law.

After extensive discussion of Virginia's workmen's compensation statutes, 9A Virginia Code §§65.1-5, -29, -35, -40, -103, and decisions of state and federal courts construing them, the district judge found that Quioccasin, Farber, and Lee-Hy were in the "same employ" for purposes of the

Virginia compensation statutes; *i.e.*, all were engaged in developing the Regency Square Shopping Center, and that under Virginia law Mrs. O'Connor's sole remedy would be the recovery of the benefits provided in the Virginia workmen's compensation statutes and no damage action would lie against Lee-Hy or Clem. It is not disputed, under §29(6) of the New York Workmen's Compensation Law, which provides that rights under the compensation law are exclusive "when such employee is injured or killed by the negligence . . . of another in the same employ," Mrs. O'Connor would not be barred from suing Lee-Hy and Clem for wrongful death occasioned by their negligence. The district judge held that New York would apply its law and consequently granted a motion by the plaintiff to strike an affirmative defense based on the Virginia workmen's compensation statutes and denied a motion by defendants for summary judgment on the same basis.

The question we must determine is what law a New York court seized of the *O'Connor* action would apply. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Appellants do not contend that New York is constitutionally required to apply Virginia law. *Carroll* v. *Lanza*, 349 U.S. 408 (1955), which dealt with the converse situation where the law of the state of employment barred third party suits but the law of the state of the accident, which was also the forum, did not, and Restatement Second of Conflict of Laws §183, make it plain that New York is constitutionally free to apply its own law if it chooses.

Appellants mount a strong case that New York would—or in any event should—apply Virginia law. Recognizing that *Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743

(1963), represented a departure from the *lex loci delictus* rule, which would here dictate application of Virginia law, they assert that Virginia's "contacts" far outweigh New York's and that New York's interest in seeing that O'Connor's representatives receive adequate compensation for his death must be harmonized with the policy of limiting the costs imposed on employers by industrial accidents, which would dictate following Virginia law. They emphasize that Lee-Hy planned its insurance program on the justifiable assumption that all work-related accidents on the job site would be governed by workmen's compensation and that allowing an action for damages would run counter to Lee-Hy's reasonable expectations.[12] Appellants rely also on §184 of the Restatement Second of the Conflict of Laws, which states:

> Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which
>
> (a) the plaintiff has obtained an award for the injury, or
>
> (b) the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where employment is principally located, or (3)

12. We do not find this argument particularly impressive since the record shows that Lee-Hy carried insurance for liabilities other than those covered by the workmen's compensation statutes to a policy limit of $2,000,000. Although the affidavit of Lee-Hy's president is ambiguous, we do not understand it to aver that Lee-Hy's policies do not cover the accident involving O'Connor. No such defense has been asserted.

> where the employer supervised the employee's activities from a place of business in the state, or (4) whose local law governs the contract of employment under the rules of §§187-188 and 196.[13]

Finally appellants discern in *Neumeier* v. *Kuehner*, 31 N.Y. 2d 121, 128-29, 335 N.Y.S.2d 64, 70-71 (1972) and *Rogers* v. *U-Haul*, 41 A.D.2d 834, 342 N.Y.S.2d 158 (2d Dept. 1973), "a recent New York trend back to *lex loci*."

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13. Appellants cite a number of New York cases, decided before *Babcock* v. *Jackson*, *supra*, also cited in the Reporter's Note to Restatement §184, which they argue apply the policies reflected in §184. We do not find these relevant here. In *Barnhart* v. *American Concrete Steel Co.*, 227 N.Y. 531 (1920), participation in the New Jersey workmen's compensation program was optional, and plaintiff's decedent had elected to be covered. The Court of Appeals held that as a matter of contract law the plaintiff was bound by the terms of the New Jersey scheme, which excluded any other remedies against the employer, and therefore could not bring a wrongful death action against the employer in New York. Daniel O'Connor made no analogous election to be covered by Virginia law. In *Yoshi Ogino* v. *Black*, 304 N.Y. 872 (1952), *aff'g*, 278 App. Div. 146, 104 N.Y.S.2d 82 (1st Dept. 1951), the appellate division reversed a decision striking a defense based on the exclusivity of North Carolina workmen's compensation remedies because it found that the North Carolina Workmen's Compensation Board would not necessarily be bound by a decision of the New York Board that plaintiff's injury had not occurred in the course of his employment. The appellate division concluded,

> Possibly, as alleged by defendant, the North Carolina Workmen's Compensation Law may provide plaintiff's exclusive remedy. The determination of this question must await an examination of North Carolina law at such time as the merits of this defense may be considered.

104 N.Y.S.2d at 86. The choice of law question was not considered, doubtless because New York law was still firmly ensconced in the *lex loci delictus* methodology and the accident had occurred in North Carolina. Indeed, the choice of law question was not even certified to the Court of Appeals. 304 N.Y. 872. *DeRosa* v. *Slattery Contracting Co.*, 14 A.D.2d 278, 220 N.Y.S.2d 871 (1st Dept. 1961), *aff'd*, 12 N.Y.2d 735, 234 N.Y.S.2d 217 (1962), was an even more straightforward application of the *lex loci* doctrine and hence is no longer a viable precedent.

Mrs. O'Connor's arguments for the application of New York law are also powerful. She stresses that the decedent was a resident of New York, was employed in New York by a New York proprietorship, and worked in and out of his employer's office in New York. It would be unjust, plaintiff argues, if the rights of such a person should vary from day to day, depending on the state to which he happened to be dispatched to carry out his New York employer's business.[14] Plaintiff argues further that what appellants' perceive as a recent New York trend back to *lex loci* can be discerned only in cases in which the plaintiff was not a New York resident. She points instead to the one New York decision most nearly on point, *MacKendrick* v. *Newport News Shipbuilding & Dry Dock Co.*, 59 Misc.2d 994, 302 N.Y.S.2d 124 (Sup. Ct. N.Y. Co. 1969), where a respected New York judge denied, with a considerable show of rhetoric, a contention similar to that advanced by the defendants here.[15]

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14. This argument also is less impressive than might appear at first blush. O'Connor hardly engaged in estate planning on the basis that if he were killed in the course of employment, his estate would have a claim against any negligent third party.

15. In *MacKendrick*, the plaintiff's decedent was employed by a New York firm under contract with Westinghouse to manufacture cooling systems for submarines. Westinghouse was employed by the Navy to install the cooling systems, and Newport News, to construct the submarines. MacKendrick was sent to the defendant's shipyards in Virginia to repair inadequacies in the cooling system, and he was killed there in an industrial accident. The court held first that MacKendrick's employer was not a subcontractor of any Newport News undertaking within the meaning of the Virginia Workmen's Compensation Law, and therefore he was neither entitled to that statute's remedies, nor, more importantly, subject to its provisions barring wrongful death actions. However, the court did reach the choice of law question in determining whether to apply Virginia's limitation of

(footnote continued on next page)

Our task, as noted, is to determine not what law we would choose to apply but what law the New York courts would apply. Although we do not pretend to full understanding of *Babcock* v. *Jackson*, *supra*, and the many decisions of the Court of Appeals in its wake and might think that, in the light of fifteen years of experience under *Babcock*, the departure from the certainty of the *lex loci delictus* rule was not such a famous victory as it first appeared to be, see Ehrenzweig, Conflicts in a Nut Shell, 216-19 (3d ed. 1974), Cramton, Currie & Kay, Conflict of Laws 259-61 (2d ed. 1975), we see no indication that the highest court of New York has wavered in its determination to afford New York tort plaintiffs the benefit of New York law more favorable than the law of the *lex loci delictus* whenever there is a fair basis for doing so.

The line of such cases is impressive: *Kilberg* v. *Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133 (1961) (refusing to give effect to Massachusetts ceiling on recovery for wrongful death of New York resident in Massachusetts

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wrongful death recoveries to $30,000. After an extensive review of the New York choice of law decisions since *Babcock*, the court concluded:

> Clearly the public policy of our courts is to protect New York domiciliaries, wherever possible, from denial of a recovery in another jurisdiction . . . .
>
> Both logic and precedent mandate a construction consistent, whenever possible, with the State allowing a just recovery.

302 N.Y.S.2d at 140.

Although federal courts are no longer bound by the decisions of inferior state courts in the determination of state law, a decision by a lower court state judge in the mainstream of state decisions is entitled to respect. See Hart & Wechsler, The Federal Courts and the Federal System 708-10 (2d ed. 1973).

airplane crash);[16] *Babcock* v. *Jackson*, *supra*, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (refusing to apply guest statute of Ontario, where accident occurred, to defeat claim of New York passenger); *Macey* v. *Rozbicki*, 18 N.Y.2d 289, 274 N.Y.S.2d 591 (1966) (refusing to apply Ontario guest statute against New York plaintiff even though she was staying at her relatives' home in Canada and trip began and was to end there); *Miller* v. *Miller*, 22 N.Y.2d 12, 290 N.Y.S.2d 734 (1968) (refusing to apply Maine limitation on recovery in wrongful death action where a New York resident was killed while in a motor vehicle operated by his brother and owned by his sister-in-law who were Maine residents); *Tooker* v. *Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519 (1969) (refusing to apply Michigan guest statute to accident in Michigan involving New York passenger). In *Rosenthal* v. *Warren*, *supra*, 475 F.2d at 443, we reviewed these cases and found, as did the court in *MacKendrick*, see note 15 *supra*, that they left us with:

> the overwhelming conclusion that, except for a federal case which relied heavily on a discredited state case, the strong New York public policy against damage limitations has triumphed over the contrary policies of sister states in every case where a New York domi-

16. We followed *Kilberg* in two other cases arising from the same Massachusetts airplane accident, *Pearson* v. *Northeast Airlines, Inc.*, 309 F.2d 553 (2 Cir. 1962) (*en banc*), *cert. denied*, 372 U.S. 912 (1963), where the facts were identical with those in *Kilberg*, and *Gore* v. *Northeast Airlines*, 373 F.2d 717 (2 Cir. 1967), where the plaintiff executrix and decedent's children had removed from New York to Maryland before suit was brought. More recently we followed *Kilberg* in *Rosenthal* v. *Warren*, 475 F.2d 438 (2 Cir.), *cert. denied*, 414 U.S. 856 (1973), refusing to apply Massachusetts' wrongful death limitations statute in a malpractice suit brought by the widow of a New York citizen against a Boston physician and hospital, and cited with approval the *MacKendrick* decision discussed above.

ciliary has brought suit. This conclusion is particularly striking in wrongful death actions where the New York policy, embedded in a state constitutional prohibition against damage limitations, has without exception been applied in suits brought for New York decedents since *Kilberg*.

Here the basis for applying the more favorable New York law rather than the law of the *lex loci* to *O'Connor* is at least as great as in the cases cited. Appellants have failed to furnish us with persuasive reasons to believe that, if confronted with the problem here presented, the New York Court of Appeals would turn away from the path it has consistently followed since *Kilberg* and subject a New York resident, employed in New York by a New York employer and based in New York, to Virginia law which prevents him or his estate from suing for negligence a non-employer alleged to have negligently injured or killed him at the worksite.[17] Accordingly we uphold the ruling of the district judge.[18]

All orders affirmed.

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17. If it be said that the Virginia rule here at issue is less unreasonable than a limitation on recovery for wrongful death, which New York is prohibited from enacting by its Constitution, Art. I, §16, or guest statutes, we find nothing to indicate either that this enters significantly into the choice of law determinations of the Court of Appeals or that it would not consider Virginia's restriction on the right to sue third parties for negligence at the worksite as being quite as unreasonable as a guest statute.

18. Appellants could argue that thus subjecting the insurer to New York's choice of law, which is more favorable to a plaintiff than Virginia's, demonstrates a hardship visited by *Seider* on the insurer and, because of an effect on future ratings, on the insured. However, exactly the same consequences would ensue if New York had authorized in terms a direct action on behalf of New York residents against insurers doing business in New York, and nothing in *Shaffer* affects our holding in *Minichiello, supra,* 410 F.2d at 110, that this would be constitutional.

Appendix B

UNITED STATES DISTRICT COURT

E. D. NEW YORK

No. 75 C 1853.

Sept. 27, 1977.

Marguerite T. O'Connor, as Administratrix of the Goods, Chattels and Credits of Daniel J. O'Connor, Deceased, Plaintiff,

v.

Lee-Hy Paving Corp. and Davis E. Clem, Defendants.

MEMORANDUM and ORDER

DOOLING, District Judge.

Defendants, by motion to set aside the order of attachment and service of process and to dismiss the action, raise the question whether *Shaffer* v. *Heitner,* 1977, —— U.S. ——, 97 S.Ct. 2569, 53 L.Ed.2d 683, invalidates jurisdiction based on the typical *Seider* v. *Roth,* 1966, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312, attachment.

The action is for personal injuries and wrongful death. The claim is that plaintiff's decedent was killed through the negligent operation of a grader owned by Lee-Hy and

driven by Clem at a shopping center construction site in Henrico County, Virginia. The decedent was, and the plaintiff widow and her three children are residents of New York. Lee-Hy is a Virginia corporation the activities of which are confined to that state and Clem is a resident of Virginia, an employee of Lee-Hy and has been working only in Virginia. The decedent was an employee of a New York corporation and his office was at the firm's New York office; he visited the shopping center construction site frequently, at least once a week, and, frequently, three or four times in a single week. He was on an overnight visit to the site on September 24, 1975, when he was killed.

Plaintiff obtained a *Seider* v. *Roth* attachment based on the contractual obligations of Royal Globe Insurance Company and Continental Casualty Insurance Company to defendant Lee-Hy. Both insurance companies maintain offices in New York.

Defendants argue that *Shaffer* requires for the exercise of jurisdiction sufficient contacts among the forum, the defendant and the litigation to satisfy the standards of *International Shoe Co.* v. *Washington,* 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.* Applying that test, they argue

* International Shoe raised the questions (1) whether the Company was liable to the state for unemployment compensation fund contributions based on the wages paid by the company to its eleven to thirteen salesmen resident in the state for their services in the state, and (2) whether, when the Company did not pay the contributions, the state could enforce payment by suit initiated by service of process on one of the resident salesmen. The Court concluded (326 U.S. at 320, 66 S.Ct. at 160):

> "Applying these standards the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout

(footnote continued on next page)

that defendants had no relevant contact whatever with the forum state, New York. The necessary conclusion, they urge, is that it is only the suability of the insurers, treated as "property" of defendants, that can be put forward as the basis of jurisdiction, and that, under *Shaffer* is insufficient.

Plaintiff contends, in substance, that this is not a case in which jurisdiction builds on nothing but property unconnected with the subject matter of the action, but an application of a now familiar jurisdictional principle that was evolved in keeping with the standards outlined in *International Shoe*. Plaintiff notes that she is a New York resident and that the insurance contracts are contracts to defend against and indemnify against her claim.

Defendants reply that it is defendants' not plaintiffs', contacts with New York that are jurisdictionally significant, and that the property here, the insurance contracts, are "property" in which plaintiff has an interest only if and to the extent—and perhaps, even, when—her claim is

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the years in question. They resulted in a large volume of interstate business in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. *The obligation which is here sued upon arose out of those very activities.* It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure."

An issue was whether commerce was impermissibly burdened by the unemployment compensation system and its enforcement in the Company's case, and the Court held that it was not.

shown to be valid, and is, thus, no different from any other property seized under a writ of foreign attachment.

Shaffer is best read for the legal concepts it enunciates rather than for its application of them to the facts in the record before it. The dissent of Mr. Justice Brennan from Part IV of the opinion, and that part only, suggests that, and the dissent reflects also disagreement with the limited or nil significance assigned to the choice-of-law factor in determining the question of jurisdiction (—— U.S. at ——, ——, 97 S.Ct. at 2586, 2591). *Shaffer* clearly and repeatedly emphasizes that jurisdiction depends on a finding of sufficient contacts among defendants, the litigation, and the forum (state) (—— U.S. at ——, ——, ——, ——, ——-——, 97 S.Ct. at 2572, 2576, 2580, 2582, 2582-2583, and, in concurring and dissenting opinion, ——, 97 S.Ct. at 2588), and holds that, while the presence of property in the forum state may bear on the existence of jurisdiction by providing contacts among the forum state, the defendant, and the litigation (—— U.S. at ——, 97 S.Ct. at 2582), where the property assertedly serving as the basis for jurisdiction is completely unrelated to plaintiff's cause of action, the presence of the property alone would not support a State's judicial jurisdiction (—— U.S. at ——-——, 97 S.Ct. at 2582-2583), and all assertions of state judicial jurisdiction must be evaluated by the standards set out in *International Shoe* and later cases (—— U.S. at ——-——, 97 S.Ct. at 2584-2585). The Court rejected as without modern justification the "fiction" that jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property. The standard drawn from

International Shoe (—— U.S. at ——-——, 97 S.Ct. at 2579-2580) is this:

> "The question in *International Shoe* was whether the corporation was subject to the judicial and taxing jurisdiction of Washington. Chief Justice Stone's opinion for the Court began its analysis of that question by noting that the historical basis of *in personam* jurisdiction was a court's power over the defendant's person. That power, however, was no longer the central concern:
>
> > 'But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278.' 326 U.S., at 316, 66 S.Ct., at 158.
>
> "Thus, the inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was 'present' but on whether there have been
>
> > 'such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.' *Id.*, at 317, 66 S.Ct., at 158.
>
> Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:

> 'Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.' *Id.*, at 319, 66 S.Ct., at 160.
>
> Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction. The immediate effect of this departure from *Pennoyer*'s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants." (Footnotes omitted.)

Noting that in cases like *Harris* v. *Balk*, 1905, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023, "the only role played by the property is to provide the basis for bringing the defendant into court," the Court said (—— U.S. at ——, 97 S.Ct. at 2583):

> "In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."

It is not argued, nor could it be, that Lee-Hy or Clem have even a minimum of contacts with New York, the forum state, or that, if, instead of contract rights against two insurers, tangible property transiently in New York

were the property attached, it would be easy to claim that jurisdiction could exist in a New York court. That is not clear to the exclusion of every doubt. If *Pennoyer* v. *Neff*, 1877, 95 U.S. 714, 722, 723, 727, 24 L.Ed. 565, was wrong so far as it sought to resolve questions of jurisdiction in terms of two principles, that is, that each state has exclusive jurisdiction and sovereignty over persons and property within its territory and that no state can exercise direct jurisdiction and authority over persons or property outside its territory, and was wrong to conclude that due process with respect to the judicial disposition of property required no more than seizure of it at the very outset of the judicial proceeding and the giving of adequate notice and the opportunity to defend against the claim on which the property was seized, the new standard cannot be taken as crystallized into a declaration that every suit initiated against a non-resident by writ of foreign attachment must be dismissed. The conclusion is, rather, that it must be examined anew to determine whether the demands of fundamental fairness have been met or flouted, using the *International Shoe* and *Shaffer* standards. In that analysis, the kind of jurisdiction professedly exercised is significant. It, then, becomes necessary to note that in *Shaffer* and in *International Shoe* the jurisdiction sought to be exercised was personal jurisdiction, the power to award a judgment against the defendant personally in any amount warranted by the evidence. In a wider analysis it is to be borne in mind that when allegedly tortious conduct causes death, a legal relationship is established between the alleged tort feasor and the decedent's dependents. Despite *Hanson* v. *Denckla*, 1957, 357 U.S. 235, 253, 78 S.Ct. 1228,

2 L.Ed.2d 1283, an analysis of jurisdictional propriety in the ultimate terms implied by *Shaffer* cannot ignore the claimant's circumstances and her interest in litigating in the forum of her residence. The question, here, is not whether the process is good as quasi-in-rem process, but whether exercising jurisdiction comports with due process in light of *Shaffer*. And it may be as well to bear in mind that no jurisdictional issue has created more controversy in the last decade than that posed by *Seider* v. *Roth*, and that *Shaffer* nowhere refers to the *Seider* v. *Roth* assertion of jurisdiction unless, as plaintiff intimates, it did so in its reference in footnote 30 to Smit, *The Enduring Utility of In Rem Rules*, 1977, 43 Brooklyn L.Rev. 600 (which approved *Seider* v. *Roth*) and in saying in the footnote that the Court did not suggest that jurisdictional doctrines other than those discussed in text, such as particularized rules governing adjudication of status, are inconsistent with the standard of fairness.

Seider v. *Roth* was an action by New York residents against a resident of Quebec arising out of an accident in Vermont. Plaintiffs served a levy under an order of attachment on the casualty insurance company which had issued an automobile liability policy to defendant. The majority put the decision on the ground that the policy was a "debt" owed to defendant which could be seized in attachment under N.Y.C.P.L.R. §6202 in light of Section 5201, which defines debt very inclusively. The court relied on *Matter of Riggle's Estate*, 1962, 11 N.Y.2d 73, 226 N.Y.S. 2d 416, 181 N.E.2d 436; that case had held that the existence of such a liability policy covering a deceased nonresident could furnish the asset basis for appointing a New

Appendix B

York Ancillary Administrator (with will annexed) to continue the defense of an action commenced against the decedent during his lifetime; the action arose out of an accident in Wyoming and the plaintiff resided in New York. *Riggle* and *Seider* v. *Roth* cited *Furst* v. *Brady*, 1940, 375 Ill. 425, 31 N.E.2d 606, in which before suit an administrator was appointed for a deceased non-resident based on an asset consisting of a liability policy. Suits were thereafter commenced against the administrator, and the decedent's daughter then sought to set the administration aside as jurisdictionally defective. The Supreme Court of Illinois denied the application. The court noted that the real issues were between the plaintiffs in the suits and the insurance company and that the administration was admittedly procured for the purpose of ultimately reaching the proceeds of the insurance contract. The other cases cited both in *Riggle* and in *Seider* v. *Roth* were much to the same effect. The court in *Seider* v. *Roth* did not blink the fact that its decision "would be setting up a 'direct action' against the insurer" to the extent of requiring the insurer to defend in New York, not because a debt owing by it to defendant had been attached, "but because by its policy it has agreed to defend in any place where jurisdiction is obtained against its insured. Jurisdiction is properly acquired by . . . attachment since the policy obligation is a debt owed to the defendant by the insurer, the latter being regarded as a resident of this State . . .". The court noted that in *Oltarsh, infra*, a direct action had been allowed in favor of residents, and that no reason of policy inhibited *Oltarsh* or the result in *Seider* v. *Roth*. The dissent challenged the reasoning as essentially circular: ". . . the promise to

defend . . . is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can . . . accrue."

Oltarsh v. *Aetna Insurance Co.*, 1965, 15 N.Y.2d 111, 256 N.Y.S.2d 577, 204 N.E.2d 622, was a case in which residents of New York allegedly suffered a tortious injury in a building in Puerto Rico owned by a Puerto Rican company. Aetna had issued a public liability policy to the Puerto Rican company, and Aetna was qualified to do and was doing business in New York. Plaintiff sued Aetna directly, relying on the Puerto Rican direct action statute. The lower courts dismissed the action on the ground that its maintenance was objectionable to New York's policy. The Court of Appeals reversed, finding the Puerto Rican statute substantive and broadly enough phrased to embrace suits by non-residents of Puerto Rico instituted outside Puerto Rico. The court rejected the argument that New York's strong policy against the disclosure of the existence of liability insurance to trial juries required rejection of the suit, and noted that the rule of non-disclosure is not absolute, that it may nowadays be assumed that juries know that defendants in negligence cases are insured and that an insurance company and its lawyer are defending the suit. The court observed that New York's Insurance Law §167 revealed a different pattern but was not a basis for declining jurisdiction or refusing to give effect to the foreign provision.

The court reconsidered *Seider* v. *Roth* in *Simpson* v. *Loehmann*, 1967, 1968, 21 N.Y.2d 305, 287 N.Y.S.2d 633, 234 N.E.2d 669, 21 N.Y.2d 990, 290 N.Y.S.2d 914, 238 N.E.2d 319, "in the light of Federal constitutional issues not

raised'' in *Seider* v. *Roth*. The issues were due process, burdening interstate commerce in insurance, and impairment of the obligation of the contract of liability insurance. Again, the New York action was brought against a resident of Connecticut by a New York resident injured off the Connecticut shore in a boating accident, and the insurer was a Pennsylvania company doing business in New York. Chief Judge Fuld, writing for two of the judges, repeated the language from the majority opinion in *Seider* v. *Roth* that counted on *Matter of Riggle's Estate* and compared the policy implication of *Oltarsh* with those urged in *Seider* v. *Roth*. The Chief Judge then said (21 N.Y.2d at 310-311, 287 N.Y.S.2d at 636, 234 N.E.2d at 671):

"As demonstrated by a reading of the majority and dissenting opinions in the *Seider* case, the question whether the insurer's obligation constitutes a debt owing to the insured defendant and, as such, is subject to attachment under the CPLR was thoroughly debated and considered. It was our opinion when we decided that case, and it still is, that jurisdiction in rem was acquired by the attachment in view of the fact that the policy obligation was a debt to the defendant. And we perceive no denial of due process since the presence of that debt in this State (see, *e.g.*, *Harris* v. *Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023)—contingnent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him. It is, of course, hardly necessary to add that neither the *Seider* decision nor the present one purports to expand the basis for in personam jurisdiction in view of the fact that the

recovery is necessarily limited to the value of the asset attached, that is, the liability insurance policy. For the purpose of pending litigation, which looks to an ultimate judgment and recovery, such value is its face amount and not some abstract or hypothetical value.

"The argument that our decision sanctions a 'direct action' against the insurer is sufficiently answered by what we wrote in *Seider* v. *Roth* (17 N.Y.2d 111, at 114, 269 N.Y.S.2d 99, 216 N.E.2d 312):

> 'It is said that by affirmance here we would be setting up a "direct action against the insurer. That is true to the extent only that affirmance will put jurisdiction in New York State and require the insurer to defend here, not because a debt owing by it to the defendant has been attached but because by its policy it has greed to defend in any place where jurisdiction is obtained against its insured.' "

Since the authority of *Harris* v. *Balk* has been overshadowed by *Shaffer*, although the Court may not have overruled it in explicit terms, it is important that Chief Judge Fuld noted separately the predicate considerations of *Seider* v. *Roth*. He said (21 N.Y.2d at 311-312, 287 N.Y.S. 2d at 637, 234 N.E.2d at 672):

> "The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, *e.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223; *Longines Wittnauer Watch Co.* v. *Barnes & Reinecke*, 15 N.Y.2d 443,

261 N.Y.S.2d 8, 209 N.E.2d 68). Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation (See, *e.g.*, *Thrasher* v. *United States Liab. Ins. Co.*, 19 N.Y.2d 159, 167, 278 N.Y.S.2d 793, 225 N.E.2d 503.) Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large.

"The position taken by some who disagree with *Seider* would require that, as a matter of State policy, insurance be explicitly eliminated as the basis for the exercise of our in rem jurisdiction but this represents a judgment requiring data and information with respect to the practical effect of the *Seider* decision not presently available to this court."

The language adumbrates *Shaffer*; it rests, as does *Shaffer*, on *International Shoe*.

Judge Keating, concurring in the result, observed that the insurer in such a policy, must defend in any state in which the insured is involved in an accident, including direct action states—such as Louisiana. After speaking of the interest of direct action states in the lot of its residents injured in accidents occurring in the direct action state, Judge Keating continued:

"Similar State interests, it seems to me, would sustain a direct action against the insurer in this

jurisdiction if the Legislature had authorized such actions, even though the action could not have been brought directly in the State in which the accident took place. Although no direct action statute is presently in effect, I see no policy reason for not holding that service of process on the real party defendant—the insurer—is sufficient to compel it to defend in this State, provided it transacts business here and is thus subject to the jurisdiction of our courts.

"This court has on a number of occasions given effect to the strong State interest in facilitating recovery of persons injured in automobile accidents. The fact that the injury occurs outside of this State does not, of course, lessen that interest. (*Babcock* v. *Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279; *Macey* v. *Rozbicki*, 18 N.Y.2d 289, 292, 274 N.Y.S. 2d 591, 221 N.E.2d 380 [concurring opn.].)

"Likewise, we have on a number of occasions recognized that the real party in interest is the insurer and we have given effect to the fiction sought to be perpetuated here only where the insurer would be prejudiced thereby. As we recently stated: 'The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action [only] in order to protect the insurance company aga nst overly sympathetic juries.' "

Judges Breitel and Bergan concurred in the decision "on constraint of *Seider* v. *Roth*" because "the institutional stability of a court is more important than any single tolerable error." Judge Burke dissented, questioning whether the "direct action" approach was constitutionally tolerable where the accident giving rise to the alleged liability occurred outside the forum. On this

ground he differentiated *Watson* v. *Employers Liability Assurance Corp.*, 1954, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74, in which the Court held valid the provisions of the Louisiana direct action statute that outlaws policy provisions forbidding direct action as the statute was applied in a suit by a resident of Louisiana based on personal injuries sustained in Louisiana from the use of a product made in Illinois by a subsidiary of a company headquartered in Massachusetts. The insurance policy was issued in Illinois and Massachusetts by a British insurer; the insurer had been compelled to sign an assent to direct actions as a condition of being qualified to do business in Louisiana. In his dissent in *Simpson* Judge Burke also criticized the *in rem* basis of jurisdiction both on situs and contingency grounds. Judge Scileppi concurred with Judge Burke.

On reargument the court made explicit its holding that the recovery in a *Seider* v. *Roth* type attachment could not exceed the face value of the policy attached even if the action was defended on the merits; further consideration of the provisions of N.Y.C.P.L.R. 320(c), seemingly exacting a general appearance in order to defend on the merits, as applicable to other types of attachment cases, was left to the future.

Thrasher v. *United States Liability Ins. Co.*, 1967, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503, cited by Judges Fuld and Keating in *Simpson*, held that service of the judgment against the insured on the carrier-appointed attorneys who had defended the insured was effective service on the insurance carrier for the purpose of enforcing the judgment against it pursuant to Insurance Law §167

sd.1(b). The court said (19 N.Y.2d at 167, 278 N.Y.S.2d at 799, 225 N.E.2d at 507)

> "Although [the attorneys] were technically representing [the insured], in reality they were representing the interest of the insurance company (*Oltarsh* v. *Aetna Ins. Co.*, 15 N.Y.2d 111, 118-119, 256 N.Y.S.2d 577, 204 N.E.2d 622; *Bearor* v. *Kapple*, Sub., 24 N.Y.S. 2d 655, 658-659; *cf. Bennett* v. *Troy Record Co.*, 25 A.D.2d 799, 269 N.Y.S.2d 213). The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action in order to protect the insurance company against overly sympathetic juries (see *Leotta* v. *Plessinger*, 8 N.Y.2d 449, 461-462, 209 N.Y.S.2d 304, 171 N.E.2d 454). Once a judgment has been rendered, however, and a suit is subsequently brought against the insurance company, the reason for the fiction no longer exists for the factor of insurance is now one of the essential elements of the pending cause of action (see *Oltarsh* v. *Aetna Ins. Co., supra*, 15 N.Y.2d p. 118, 256 N.Y.S. 2d 577, 204 N.E.2d 622). To hold that service on the attorney retained by the insurance company does not constitute service upon the insurer only serves to perpetuate this fiction. That it is fiction is abundantly demonstrated by the present case. The services of Glatzer, Glatzer & Evans were retained and paid for by the insurer. They had complete control of the defense in the negligence action."

Seider v. *Roth* and *Simpson* came under exacting constitutional scrutiny in *Minichiello* v. *Rosenberg*, 2d Cir. 1968, 410 F.2d 106, and *Farrell* v. *Piedmont Aviation, Inc.*, 2d Cir. 1969, 411 F.2d 812. Judge Friendly wrote in both cases. In the first, treating *Seider* v. *Roth* and *Simpson*

as "in effect a judicially created direct action statute," he concluded that it was not invalid. Of *Watson* the court said (410 F.2d at 110):

> ". . . the Justice's final consideration—the plaintiff's difficulty in bringing the defendant before the forum—applies with even greater force to the state of plaintiff's residence than to that of injury in light of the development of long-arm statutes that will generally allow the state of injury to obtain personal jurisdiction of the insured and so avoid the need for a direct action against the insurer.
>
> "We thus believe that, all things considered, the Supreme Court would sustain the validity of a state statute permitting direct action against insurers doing business in the state in favor of residents as well as on behalf of persons injured in it."

The state's interest in protecting its residents was considered to be as great as its interest in a nonresident's in-state accident. The burden to the named defendant was considered as largely swept away by the *Simpson* limitation of the recovery to the face amount of the policy, possibly a constitutionally required limitation. On rehearing in banc, Judge Friendly used *Harris* v. *Balk* to meet the argument that *Seider* v. *Roth* was too burdensome to the named defendant. He said (410 F.2d at 118), after explaining Balk's dilemma when the debt was attached—engage a lawyer to defend a $180 claim in a Maryland court or default—

> "The Maryland judgment deprived Balk of money he could have used for whatever purpose he willed; a *Seider* judgment would mean simply that liability pol-

> icies, on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured."

Judge Friendly observed that the named defendant could defend fully without exposure to personal liability, that named defendant's covenant of cooperation might not even subject him to the inconvenience of required attendance at trial in the forum, and that the typical *Seider* v. *Roth* case was removable to the federal court, where defendant had the right under 28 U.S.C. §1404(a) to move to transfer the case for the convenience of the parties and witnesses, in the interest of justice, to the place of defendant's residence or the place of the accident. *Cf. Van Dusen* v. *Barrack,* 1964, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945.

Farrell in substance limited *Seider* v. *Roth* to those cases in which the plaintiff was resident in the forum state, because the constitutional doubt with respect to applying it in favor of nonresidents suing on out-of-state accidents would be exceedingly serious. Judge Friendly read both *Seider* v. *Roth* and *Simpson* as implying such a limitation (411 F.2d at 816-817).

Seider v. *Roth* has not been widely followed. It was followed in *Forbes* v. *Boynton,* 1973, 113 N.H. 617, 313 A.2d 129 in a suit by a resident of New Hampshire against a resident of New York arising out of an accident in Maine. The court considered that jurisdiction could be rested on the nonresident defendant's rights under the liability insurance policy; the court relied on *Robinson* v. *Carroll,* 1934, 87 N.H. 114, 174 A. 772, a case similar to *Matter of*

Riggle's Estate, and one of the cases relied on by the majority in *Seider* v. *Roth.* The court said (313 A.2d at 132):

> "It is well established that the liability of the insurer to indemnify becomes fixed on the happening of an accident within the coverage of the policy, subject to defenses which may arise thereafter."

The court emphasized that the insurer is in full control of the litigation and selects defense counsel. The court declined to characterize the procedure as "direct action" against the insurer. The court, however, added (313 A.2d at 133):

> "Our legislature has provided a means by which foreign motorists who have been involved in an accident on our highways can be submitted to the jurisdiction of our courts in actions for damages resulting therefrom. RSA ch. 264 (Supp. 1972). The State of New Hampshire has a similar interest in providing a resident plaintiff the use of our courts to obtain redress for injuries incurred in an accident on an out-of-State highway *particularly when the State of residence of the defendant would furnish the defendant a forum if the roles were reversed. Simpson* v. *Loehmann,* 21 N.Y.2d 305-319, 287 N.Y.S.2d 633-645, 234 N.E.2d 669-677 (1967)." (Emphasis added).

Robitaille v. *Orciuch,* D.N.H.1974, 382 F.Supp. 977, in effect treated *Forbes* v. *Boynton* as confined to automobile accident cases, and to cases where the defendant's state of residence also applied *Seider* v. *Roth.* In *Camire* v. *Scieszka,* 1976, 116 N.H. 281, 358 A.2d 397, the court narrowed *Forbes* to its special facts without repudiating its result.

Appendix B

The Supreme Court of Minnesota sustained the validity of the *Seider* v. *Roth* type of attachment as limited to suits by residents, with limitation of recovery to the amount of the liability insurance policy, provided adequate notice and an opportunity to defend are given to the named defendant. *Savchuk* v. *Rush,* Minn.1976, 245 N.W.2d 624. The District Court in Minnesota had earlier reached the same conclusion in *Rintala* v. *Shoemaker,* D.Minn.1973, 362 F.Supp. 1044. *Cf. Adkins* v. *Northfield Foundry and Machine Co.,* D.Minn.1974, 393 F.Supp. 1079 (action dismissed where plaintiff is non-resident.)

Fairly representative of the more numerous cases rejecting *Seider* v. *Roth* is *Javorek* v. *Superior Court,* 1976, 17 Cal.3d 629, 131 Cal.Rptr. 768, 552 P.2d 728; the Supreme Court of California carefully carefully reviewed the New York cases, including *Minichiello.* It put its decision on the grounds that the insurer's obligation remains contingent until the insured's liability has been determined, that the reasoning in *Seider* v. *Roth* was essentially circular, and that the obligation to defend, if considered absolute and not contingent, was devoid of attachable content since it was exhausted by the performance of the service rendered to the defendant.

Seider v. *Roth* and *Simpson* are *sui generis* in the field of jurisdiction. They cannot be pigeon-holed as *in rem* or *in personam.* They are in real terms *in personam* so far as the insurer is concerned. For the named defendant the suit is only an occasion of cooperation in the defense; his active role is that of witness. It is beside the point to test the constitutionality of the procedure in terms of the named defendant; his role as a party is hardly more real

than that of the casual ejector Richard Roe in common law ejectment actions. What is at stake in the suit is the plaintiff's claim for the payment of his alleged damages by the insurer.

Section 167, subdivision 1, of the New York Insurance Law and Section 38.1-380 of the Virginia Code are alike in making the insurer directly liable to the plaintiff not only if the judgment against the insured is not promptly paid but also if the insured becomes bankrupt. The insurance contract is, thus, not merely a contract with insured protecting the insured against loss, but it directly obligates the insurer to pay persons injured by the insured's negligence. If the insurer refuses to defend, it may be brought in as a third party defendant under Rule 14 of the Federal Rules of Civil Procedure. *Colton* v. *Swain*, 7th Cir. 1975, 527 F.2d 296, 303. If the insurer in bad faith refuses to settle within policy limits, and judgment against the insured is in excess of the policy limits, the plaintiff in the action has been held to be entitled to recover directly from the insurer the excess over the policy limits. *Davis* v. *National Grange Ins. Co.*, E.D.Va. 1968, 281 F.Supp. 998.*

The emphasis in many of the cases on the supposedly contingent nature of the insurer's obligation appears to be misplaced. The occurrence of the accident, the plaintiff's injuries, and the insured's connection with the accident are determinative events. To be sure there may never

* *Henegan* v. *Merchants Mutual Ins. Co.*, 1st Dept. 1968, 31 A.D. 2d 12, 294 N.Y.S.2d 547, 549, premised its decision that the insured could recover for the insurer's wrongful refusal to settle without first paying the judgment to the claimant on the ground that to do otherwise would "permit the insurer to take advantage of the financial status of its insured and deprive the ultimate beneficiary claimant of his judgment."

be a suit, but the insured is under an immediate duty to give prompt notice of the accident to the insurer. Investigation usually commences at once, and the parties in interest, potential plaintiff, insurer and insured are identified. Control of investigation, defense and settlement are in the insurer's hands. The prospective plaintiff's relationships are with the insurer, not with the insured. When an action is commenced the insurer controls the conduct of the defense, and, if the suit is in a federal court, plaintiff may obtain discovery of the existence and content of any relevant insurance agreement (Rule 26(b)(2)). Ironically, perhaps, it is the insurer, the one who is responsible for the defense of the suit and for the payment of any judgment, and who is itself unable to deny that it is fully suable in the state, who puts forward the plea to jurisdiction in the name of the nominal defendant, who will not pay the judgment, nor manage the defense. One court, commenting on *Seider* v. *Roth* and *Simpson*, suggested that the New York court did not go far enough. *Kirchen* v. *Orth*, E.D. Wis. 1975, 390 F.Supp. 313, 319. The Wisconsin District Court sustained joinder of the insurer and dismissed the suit against the nonresident insured although holding that the Wisconsin direct action statute was inapplicable. The court said (390 F.Sup[illegible] 318-319):

> "The law has too long maintained the fiction that the insured is the real party in interest. Viewed realistically and honestly, the insurance company conducts the defense, employs its own attorneys, decides if and when to settle, and is in full control of the entire litigation. The principal concern of the insurer is to protect its own 'contingent' liability under the contract.

As a general proposition, the law of this state rejects this legal fiction, recognizing that the insurer is the real party in interest and that the insured is a mere nominal party. When utilized to completely defeat the causes of action of injured Wisconsin plaintiffs, the legal fiction created by no-action clauses becomes too onerous to enforce in good conscience. Thus, aside from the equitable consideration presented by this case, precluding the insurance company's assertion of the no-action clause is compelled by a realistic and reasonable evaluation of the respective rights of the plaintiffs, defendants, and the State of Wisconsin. The interest of the State of Wisconsin in facilitating recovery of residents injured in automobile accidents is not lessened by the fact that the accident occurred out of state. Therefore, a recognition of realities, rather than fictions, dictates the conclusion that this action is maintainable against Guaranty National, notwithstanding its no-action clause." (Footnote omitted)

See, similarly, *Barrios* v. *Dade County*, S.D.N.Y.1970, 310 F.Supp. 744.

It is concluded that *Shaffer* does not require rejection of *Seider* v. *Roth* and *Simpson*. The jurisdiction exercised under those cases is one in favor of residents only, is available only against insurers suable in the state, requires giving adequate notice to the insured, and, in all probability, the judgment rendered in such a suit does not prejudice the named defendant's right to relitigate the issues of liability and damages if he is sued again for the amount in excess of that recovered in the suit based on the *Seider* v. *Roth* attachment; and there remains the caution that the procedure may not be used as the means of obtaining a preference in the distribution of inadequate coverage in

cases involving multiple claims and claimants. See *Minichiello* v. *Rosenberg, supra; Farrell* v. *Piedmont Aviation, Inc., supra.*

Sustaining the jurisdiction in the present case does not offend the policy considerations underlying *Shaffer* and preserves the anonymity of the defending insurance company in keeping with the policy of those states, which, like New York, do not authorize direct action against insurance carriers.

It is

ORDERED that defendant's motion to set aside the service of process and to dismiss the action is denied.